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No. 1062

In the Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES COSTA AND EVELYN COSTA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner Charles Cobia is a federal civilian employee who applied for and was awarded workmen's compensation benefits under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*,[1] for personal injuries sustained by him on the premises of an Air Force installation where he worked. He then filed the present action against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), seeking recovery of damages for the same injuries.

[1] Formerly 5 U.S.C. 751 *et seq.*

The injuries were sustained by petitioner Charles Cobia [2] when the automobile in which he was riding collided with a government vehicle on the premises of the Hill Air Force Base, where Mr. Cobia was employed. At the time petitioner was on his way home from work. He and the driver of the car, another base employee, Verl N. Udy, had left the parking lot on the base and were travelling along a road in a restricted area of the base when the accident occurred, about three miles from the building where they worked.

On February 8, 1965, some three weeks after the accident, Mr. Cobia filed a claim for compensation under the Federal Employees' Compensation Act (FECA). The Department of Labor, the agency responsible for administering the FECA, applying the traditional "premises rule," found that he had been injured "while in the performance of his duty" and awarded FECA benefits to him for the period beginning January 18, 1965 (R. 268). Thereafter, Cobia filed the present action, seeking to recover damages from the government for the same injuries under the Federal Tort Claims Act (R. 1–3). Meanwhile, he continued to receive compensation benefit payments under FECA, which as of the time of trial totaled $13,029.90 (R. 270–271).

The district court (Pet. App. B–1—B–11) determined that "in equity and good conscience" Cobia's acceptance of FECA benefits precludes the suit under

[2] Petitioner Evelyn Cobia is the wife of the injured employee. Where injuries to a federal employee are covered by FECA, his wife cannot maintain a separate tort suit for loss of consortium. *Posegate* v. *United States*, 288 F. 2d 11 (C.A. 9), certiorari denied, 368 U.S. 832.

the Federal Tort Claims Act (Pet. App. B–9), and entered a judgment in the government's favor "without prejudice to the plaintiffs' continuing rights under the Federal Employees' Compensation Act." The Court of Appeals for the Tenth Circuit affirmed (Pet. App. A–1—A–3).

2. The FECA expressly provides that the liability of the government under that Act "with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States * * * to the employee." 5 U.S.C. 8116(c). This explicit provision reflects the well settled policy that "compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions." *United States* v. *Demko,* 385 U.S. 149, 151. While the district court found that Cobia was "confused and irresponsible" (Pet. App. B–8) at the time he executed his FECA claim, it concluded that this condition did not pervade all of his subsequent activities, and that, in particular, during the periods when he received and accepted FECA benefit checks he was reasonably advised and understood that he was not entitled to these benefits if he also insisted that his proper remedy was under the Tort Claims Act (*ibid.*). Nevertheless, throughout the entire course of events following the Labor Department's determination that his injuries were covered by FECA he continued to accept payment of these benefits and made no attempt to withdraw or cancel his application for them. It was within the sound discretion of the lower courts to find therefore, as they did (Pet. App. A–2; B–9), that there were no compelling reasons to permit Cobia to repu-

diate the administrative process, the fruits of which he had been freely and voluntarily accepting.

3. Moreover, this case does not properly pose the question sought to be raised, namely, whether a compensation award of FECA benefits to an employee not injured in the performance of his duty precludes a Tort Claims Act suit (Pet. 2). The Federal Employees' Compensation Act provides that the government shall pay compensation "for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty". 5 U.S.C. 8102 (a). The FECA then provides that the action of the Secretary of Labor "in allowing or denying a payment" under FECA is "final and conclusive for all purposes and with respect to all questions of law and fact; and * * * not subject to review * * * by a court by mandamus or otherwise". 5 U.S.C. 8128(b); see also 5 U.S.C. 8145. In this case, Cobia submitted a claim for FECA benefits and the Department of Labor, applying a generally recognized standard that an injury to an employee while coming to or leaving work is within the performance of his duties if it occurs on the employer's "premises," found that Cobia was in the performance of his duties at the time he was injured. See 1 Larson, *Workmen's Compensation Law,* § 15.11 (1966). Under Section 8128(b) of the FECA this determination was final and conclusive, and not subject to the district court's review for "substantial support in the evidence" (Pet. App. B–6).

4. In this context, also, it is clear that there is no conflict between the instant denial of a tort claim

remedy to Cobia and the earlier determinations by the district court and court of appeals below in another case that the driver of the car in which Cobia was riding could maintain such a suit. See *United States* v. *Udy*, 381 F. 2d 455 (C.A. 10). In *Udy* the courts confined their attention to whether or not the factual circumstances precluded the tort claim when "no proper administrative determination is interwoven with the tort claim". 381 F. 2d at 456.[3] In the absence of a determination one way or the other by the Department of Labor, the courts there found as an original matter that there was no substantial question of coverage by FECA and allowed the suit. But in this case, on the contrary, an FECA claim was submitted to the administrative agency charged with resolving questions of coverage and that agency found, in the exercise of its "conclusive" authority, that Cobia's injuries were covered by the federal compensation act.[4]

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[3] In *Udy*, the Department of Labor had rendered a decision to award benefits to Mrs. Udy, but the district court there found "that any application made by Mrs. Elizabeth J. Udy for Federal Employees' Compensation Act benefits was effectively withdrawn, abandoned and rejected prior to the time of an award by the Federal Employees' Compensation Board."

[4] *United States* v. *Muniz*, 374 U.S. 150, cited by petitioners, plainly is inapposite. The issue there concerned the right of a federal prisoner to sue under the Federal Tort Claims Act, and no question of coverage under a compensation statute was involved. See *United States* v. *Demko*, 385 U.S. 149, 153–154. Nor does *Solomon* v. *United States*, 276 F. 2d 669 (C.A. 6) create a conflict of decisions. The *Solomon* case was in no way concerned with the question here involved, *i.e.* does an exclusivity provision in a workmen's compensation law bar suit against the employer for tort damages for the same injuries for which the employee has been awarded workmen's compensation benefits.

For the reasons indicated, this tort suit was properly held to be barred.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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